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SERVICE DATE - AUGUST 11, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41737¹

BLODGETT OVEN CO., INC. n/k/a G.S. BLODGETT CORP.
--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41767

CARDINAL HEALTH, INC., ELLICOTT DRUG COMPANY
--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41774

DAVOL, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41818

LEVITON MANUFACTURING CO., INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41823

MAC TOOLS, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41828

MICHELIN TIRE CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

STB No. 41842

NALCO CHEMICAL COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41865

R.D. WERNER CO., INC. N/K/A WERNER CO.
--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41866

REEBOK INTERNATIONAL LTD. F/K/A REEBOK U.S.A. LIMITED, INC.
--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

Decided: August 3, 2000

We find that collection of the undercharges sought in these proceedings would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in these proceedings.

BACKGROUND

These matters arise out of court actions in the United States District Court for the Southern District of New York. The court proceedings were instituted by St. Johnsbury Trucking Company, Inc. (St. Johnsbury or respondent),² a former motor common and contract carrier, to collect undercharges from Blodgett Oven Co., Inc. (Blodgett), Cardinal Health, Inc., Ellicott Drug Company (Cardinal), Davol, Inc. (Daval), Leviton Manufacturing, Co., Inc. (Leviton), Mac Tools, Inc. (Mac Tools), Michelin Tire Corporation (Michelin), Nalco Chemical Company (Nalco), R.D. Werner Co. Inc. (Werner), and Reebok International, Ltd. (Reebok) (collectively, shippers or petitioners). St. Johnsbury seeks undercharges of various amounts³

² On June 15, 1993, St. Johnsbury filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 93 B 43136 (FGC).

³ Included among St. Johnsbury's undercharge claims asserted against Cardinal, Werner,
(continued...)

(plus interest) allegedly due, in addition to amounts previously paid, for transportation services rendered on behalf of the respective shippers as indicated in the Appendix.⁴ By order dated March 29, 1996, the district court directed petitioners to initiate administrative proceedings before the Board for the purpose of resolving issues of tariff applicability, unreasonable practice, contract carriage, and rate reasonableness.⁵

Pursuant to the court order, petitions for declaratory order requesting the Board to resolve all disputed issues within its primary jurisdiction were filed by each petitioner.⁶ In decisions served between May 29, 1996, and July 11, 1996, the Board established procedural schedules for each of the proceedings. Petitioners filed their opening statements between July 8, 1997, and November 4, 1997. In each case, St. Johnsbury failed to submit a reply.⁷

Petitioners assert that respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a) and that the rates respondent now seeks to collect are unreasonable.⁸ Petitioners maintain that the freight charges originally billed by St. Johnsbury and paid by the shippers were rates mutually agreed upon by the parties, and

³(...continued)

and Reebok were claims arising from intrastate transported movements. These intrastate movement claims were subsequently dismissed. See St. Johnsbury Trucking Co., Inc. v. Mead Johnson, 199 B.R. 84 (S.D.N.Y. 1996).

⁴ The Appendix identifies the subject proceedings by STB docket number and petitioner name and includes the respective bankruptcy court and district court case docket numbers, the number of involved shipments, the period during which the shipments were transported, and the total undercharge claim for each proceeding.

⁵ The court order was issued in a consolidated proceeding captioned St. Johnsbury Trucking Co. Inc. v. Morrison Knudsen Co., Inc., bearing the docket number 95 Civ. 1344 (SS).

⁶ The petitions were filed between May 20, 1996, and July 1, 1996.

⁷ Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. The failure of St. Johnsbury to participate in these agency proceedings should bind it in the court proceedings to the record developed at the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts).

⁸ Mac Tools further contends that the charges originally assessed for transporting its shipments at issue conform with published discounted commodity rates filed by respondent.

that each of the petitioners relied upon the agreed-to rates in tendering their shipments to St. Johnsbury to the exclusion of services provided by other carriers.

Petitioners support their arguments with affidavits from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioners.⁹ Mr. Bange conducted an audit and analysis of respondent's balance due claims. Attached as Exhibit A to each of the Bange affidavits is a copy of the court complaint filed against the respective shipper, listing by freight bill number the original billing date and the balance due amount claimed for each of respondent's undercharge claims against that shipper. In addition, attached as Exhibit B to each of the Bange affidavits are sample copies of the balance due bills issued on behalf of respondent to each respective shipper that reflect originally issued freight bill data as well as revised balance due amounts. Mr. Bange states that his review of the balance due bills in each of these proceedings indicates that all of the originally billed commodity rates were re-rated based on filed rates that were assertedly in effect at the time of shipment.¹⁰ The re-rated "corrected" billings produced increased freight charges that in many instances were substantially higher than the amounts originally billed. Except for the affidavit submitted on behalf of Cardinal, each of the Bange affidavits also includes copies of certain correspondence from St. Johnsbury and tariff documents issued by respondent that refer to the continued applicability of rates that, according to Mr. Bange, conform with respondent's originally assessed billings.

DISCUSSION AND CONCLUSIONS

We will dispose of these proceedings under section 13711. Accordingly, we do not reach the other issues raised.¹¹

⁹ In addition, an affidavit from Harry C. Vosganian was submitted in support of the position of Mac Tools. Mr. Vosganian is Director of Transportation for Stanley Works, corporate parent of Mac Tools, whose responsibilities included overall supervision of the surface transportation needs of Mac Tools.

¹⁰ In most instances, originally applied percentage discounts were also applied to the re-rated charges.

¹¹ Typically, a district court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., Rhinelander Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40837 (STB served Oct. 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of petitioners' liability for the rates sought.

Section 13711(a) provides, in pertinent part, that “It shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to [the jurisdiction of the Board] . . . to attempt to charge or to charge for a transportation service the difference between (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) the negotiated rate for such transportation service if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this section.”

It is undisputed that St. Johnsbury no longer transports property.¹² Accordingly, we may proceed to determine whether respondent’s attempts to collect undercharges (the difference between the applicable filed rate and the negotiated rate) are an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 13711(a) determination. Section 13711(f) defines the term “negotiated rate” as one agreed upon by the shipper and carrier “through negotiations pursuant to which no tariff was lawfully and timely filed and for which there is written evidence of such agreement.” Thus, section 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, in each case, the record contains a list of the shipments subject to respondent’s collection efforts (Bange Exhibits A) as well as a representative sample of the revised balance due freight bills issued on behalf of respondent to each respective shipper (Bange Exhibits B). The revised freight bills indicate originally assessed charges consistently below, and in many instances substantially below, those respondent is here seeking to assess. In addition, the record contains copies of tariff provisions and correspondence issued by respondent relating to rates that are in conformity with the rates originally assessed. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. Mar. 31, 1997) (mem.) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In each of these proceedings, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by St. Johnsbury and paid by the respective petitioners. The consistent application in the original freight bills of commodity rates that were in conformity with rates assertedly agreed to by the parties and included in correspondence and tariff documents issued by respondent support the unrefuted contentions of petitioners and reflect the existence of negotiated rates. The evidence further indicates that petitioners relied on the agreed-upon rates in tendering their traffic to St. Johnsbury

¹² See Bange Exhibits C at 4 in Cardinal, Nalco, and Werner; Exhibit C at 5 in Reebok; and Exhibit D at 4 in Mac Tools.

and that petitioners would not have used St. Johnsbury's services had respondent attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under the section 13711(b), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 13711(b)(2)(E)].

In each of the subject proceedings, the evidence submitted by petitioners establishes that negotiated rates were offered to petitioners by St. Johnsbury; that petitioners reasonably relied on the offered rates in tendering their traffic to St. Johnsbury; that St. Johnsbury did not properly or timely file tariffs providing for such negotiated rates and has not entered into agreements for contract carriage; that the negotiated rates were billed and collected by St. Johnsbury; and that St. Johnsbury now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for St. Johnsbury to attempt to collect undercharges from petitioners herein for transporting the shipments at issue in these proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. These proceedings are discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Sonia Sotomayor
United States District Court for
the Southern District of New York
500 Pearl Street, Room 1340
New York, NY 10038

Re: Cases listed in the Appendix

STB No. 41737, et al.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

APPENDIX

STB Docket No. & PetitionerName	Bank. Ct. Adv. Proc. No.	Dist. Ct. Civ. No.	Number of Shipments	Dates of Shipments	Undercharges Claimed
No. 41737 Blodgett Oven Co., Inc. n/k/a G.S. Blodgett Corp.	95/9522A	95-CIV- 5506(SS)	933	Between 8/29/90 and 6/10/93	\$10,785.89
No. 41767 Cardinal Health Inc. Ellicott Drug Company	95/9178A	95-CIV- 5214(SS)	385 including 236 intrastate shipments	Between 7/25/90 and 12/12/92	\$42,743.55 including intrastate claims of \$28,194.62
No. 41774 Davol, Inc.	95/9285A	95-CIV- 4920(SS)	3,172	Between 6/25/90 and 6/8/93	\$103,146.49
No. 41818 Leviton Manufacturing Co., Inc.	95/9267A	95-CIV- 5077(SS)	2,876	Between 7/30/91 and 6/14/93	\$27,904.27
No. 41823 Mac Tools, Inc.	95/8014A	95-CIV- 1345(SS)	1,775	Between 6/29/90 and 2/26/93	\$18,154.06
No. 41828 Michelin Tire Corporation	95/9225A	95-CIV- 5006(SS)	11,109	Between 6/22/90 and 12/30/92	\$942,963.72
No. 41842 Nalco Chemical Company	95/9023A	95-CIV- 4392(SS)	604	Between 1/9/91 and 5/25/93	\$12,802.84
No. 41865 R.D. Werner Co., Inc. n/k/a Werner Co.	95/9353A	95-CIV- 5134(SS)	581 including 284 intrastate shipments	Between 6/22/90 and 6/10/93	\$34,586.13 including intrastate claims of \$30,519.92
No. 41866 Reebok International Ltd. f/k/a Reebok U.S.A. Limited, Inc.	95/9187A	95-CIV- 5133(SS)	3,026 including 35 intrastate shipments	Between 2/27/91 and 6/18/93	\$58,583.81 including intrastate claims of \$1,502.71